No. 84-604

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARTIN J. JOEL, JR., HARVEY SHEID,
EVERARD M.C. STAMM, ROBERT C. STAMM,

Petitioners,

—v.—

JOHN CIRRITO, HAROLD S. COLEMAN, JOHN A. MILLER,
FRANCIS G. REA, PETER M. TOCZEK, A.J. YORKE,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should this Court entertain the questions posed by the petition, at a point when Congress itself is about to address those questions and others relating to civil RICO?

2. May a routine, state-law partnership dispute, subject to arbitration, be transformed into a federal action for treble damages and attorneys' fees, merely by pleading the statutory words of civil RICO?

3. Should not this Court deny certiorari so as to terminate the litigation and thereby advance the "core purpose," *Southland Corp.* v. *Keating*, 104 S. Ct. 852, 857 (1984), of the parties' agreement to arbitrate?

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COUNTERSTATEMENT OF THE CASE

The district court correctly described this case as a "garden variety business fraud action" (Pet. App. 24a). The parties are all partners of a former brokerage firm; their dispute involves a disagreement over the sale of the firm; and the dispute falls squarely within the ambit of an arbitration provision in the Partnership Agreement signed by all the parties. On any proper interpretation of civil RICO, we submit, this dispute does not belong in a federal court.

The Parties

The original parties to this action were all the general partners of the respected former brokerage firm of Bruns, Nordeman, Rea & Co. ("Bruns"). Defendants-respondents Coleman and Rea were the Managing Directors of Bruns. Together with the other four defendants-respondents, they comprised the firm's Executive Committee, which had broad responsibility for the operation of Bruns. (JA[1] 8-9, ¶¶ 6-7)

The six defendants were the most senior and accomplished partners and collectively accounted for the lion's share of the general partners' equity in the firm. (JA 66) The petitioners, none of whom were members of the Executive Committee, were among the remaining general partners of the firm. (JA 7, ¶ 4)

The Partnership Agreement

A comprehensive Partnership Agreement, signed by all the parties, governed the rights and obligations of the Bruns partners. (JA 8, ¶ 6; JA 44-103)

The Partnership Agreement provided that the Managing Directors (defendants Coleman and Rea) "by unanimous vote, shall have full power and authority on behalf of all of the partners, at any time, to sell or otherwise transfer all or substantially all of the assets and business of the partnership, on such terms and conditions as the Managing Directors, in their sole discretion, may approve. . . ." (JA 67)

The Partnership Agreement also provided that the Executive Committee (the six defendants) "shall have the right to make all determinations with respect to the business policies to be pursued by the Partnership in carrying on its business, the management of the affairs of the Partnership, and on all matters of every nature and description." (JA 51)

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1 Citations to portions of the record that are not included in the petitioners' appendix are to the Joint Appendix submitted by the parties to the Court of Appeals for the Second Circuit.

Finally, the Partnership Agreement contained a broad arbitration clause, requiring arbitration before a panel of the New York Stock Exchange of substantially all disputes, including the one at bar, relating to the partnership. The arbitration clause reads:

> In the event of any disagreement or controversy arising between any of the partners, or their legal representatives, either during the continuation of the Partnership or after its termination, with respect to the distribution of its assets or any interpretation of the terms of this Agreement, or anything in relation to the subject of the Partnership, other than any questions or matters relating to management of the business, affairs or policies of the Partnership as specified in Article 9 above, such disagreement or controversy shall be determined by arbitration pursuant to the laws of the State of New York. Such arbitration shall be conducted pursuant to the rules of the New York Stock Exchange, Inc. by the Board of Arbitration of said Exchange or pursuant to such other rules and by such other arbitral body as may be consented to by all of the parties to such disagreement or controversy. (JA 92)[2]

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2 It is clear that the dispute in this case does not come within the exception relating to "matters . . . as specified in Article 9." Article 9 of the Partnership Agreement (JA 50-51) reads, in full:

> The Executive Committee of the Partnership shall consist of the Managing Directors and such other General Partner or General Partners as the Managing Directors may in their discretion from time to time elect to said Committee (hereinafter referred to as the "additional members"). The Managing Directors shall determine the manner of election of additional members and shall have the right at any time to remove any additional member with or without cause; provided, however, that no additional member shall be elected or removed without the affirmative vote of a majority of the Managing Directors then in office. Each Managing Director shall have one (1) vote. Each additional member of the Executive Committee shall have one (1) vote or such fraction of one (1) vote as the Managing Directors in their sole discretion shall determine; provided, however, that all of the additional members in the aggregate shall not have more than three (3) votes.

The Sale to Bache

On July 23, 1981, the general partners, including all of the original plaintiffs to this action, signed a Purchase Agreement transferring substantially all of the assets of Bruns to the firm then known as Bache Halsey Stewart Shields Inc. ("Bache"). (JA 12-13, ¶ 16; JA 147-148) Negotiations between Bruns and Bache were conducted by members of the Executive Committee, who, under the terms of the Partnership Agreement, were fully authorized to do so. (JA 10-11, ¶¶ 11-12; JA 51, 67)

Under the Purchase Agreement, Bache made a lump sum payment to the Bruns partners of $3.5 million over the book value of Bruns' assets and agreed to make additional contingent payments based on future performance. The $3.5 million payment was apportioned among the Bruns partners—including plaintiffs—according to their partnership shares. (JA 13, ¶ 17)

In connection with the sale of Bruns to Bache, all the Bruns partners, including all of the plaintiffs and all of the defendants, were represented by the same distinguished counsel, Shearman & Sterling. (JA 145)

The Complaint

A year after the sale to Bache, petitioners, instead of invoking the arbitration clause in the Partnership Agreement, filed suit in the United States District Court for the Southern District of New York. Their complaint asserts three claims against defendants, each arising out of the sale of Bruns to Bache: common-law fraud, breach of fiduciary duty, and a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* (hereinafter "RICO"). There is an exact identity between the injury alleged under the RICO claim and that alleged under the two state law claims. (JA 22-24, ¶ 32; JA 27, ¶ 42) Federal jurisdiction is predicated solely on the civil RICO claim.

The complaint alleges that, in connection with the sale of Bruns to Bache, defendants for several weeks withheld material information from plaintiffs (principally that plaintiffs would be required to sign the Purchase Agreement and that the terms of their future employment with Bache continued to be open to negotiation), that "pay-offs" were made to some defendants to secure the agreement of all defendants to the sale, and that the defendants engaged in self dealing to derive personal benefit from the sale. (JA 19-21, ¶¶ 26-30; JA 11-12, ¶ 13; JA 29-30, ¶¶ 47-48)

In order to bring the action under civil RICO, plaintiffs allege that Bruns was an "enterprise," that defendants' use of the mails and telephone in the course of the sale of Bruns to Bache constituted multiple acts of mail and wire fraud, and that these alleged multiple violations constituted a "pattern of racketeering activity." (JA 8, ¶ 5; JA 21-22, ¶ 31)

There is no allegation that the defendants engaged in any wrongdoing except in connection with the sale to Bache, that the defendants used improperly obtained funds to effectuate the sale, that the defendants used the proceeds of the sale for improper purposes, that the defendants are in any way connected with organized or any other kind of crime, or that defendants have been investigated, indicted, or convicted for any crime. To be sure, plaintiffs allege "breach of fiduciary duty" and "fraud," and they dub adjustments of partnership distributions as "pay-offs." But those or similar adjectives perhaps inevitably would accompany the dissolution of any law, accounting, or business partnership in which (and, almost by definition, because) amicable relations among the partners ceased to exist.

Thus, were it not for the assertion of a civil RICO claim, this would be the most ordinary kind of state-law dispute among partners unhappy over the division of the partnership pie; and the dispute would have been long ago submitted to arbitration pursuant to the Partnership Agreement.

Proceedings Below

Defendants timely moved in the district court to dismiss the complaint for failure to state a claim for relief under civil RICO; in the alternative, to compel arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1-14. (Pet. App. 20a)

The district court dismissed the complaint for failure to state a federal claim; it did not reach the alternative motion to compel arbitration. The court focused on the language of 18 U.S.C. § 1964(c), which states:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor. . . .

The district court held that the RICO allegations of the complaint fail because the complaint alleges no injury "by reason of" a RICO violation—beyond the injury allegedly caused by the state-law wrongs. The court wrote:

> What is significant about these damage allegations [in the RICO portion of the complaint] is that they are identical to the damage allegations for the common law fraud claims—and not in any way distinct, racketeering enterprise injuries. . . . [T]he complaint should be dismissed on the ground that plaintiffs have failed to allege a separate, distinct racketeering enterprise injury. (Pet. App. 32a)

On the appeal, which was not joined in by several of the original plaintiffs, a panel of the Court of Appeals for the Second Circuit disagreed that a civil RICO plaintiff must allege a "distinct racketeering enterprise injury," but it affirmed the dismissal of the complaint on the authority of decisions by two other panels of the Second Circuit that had held such an allegation is required. (Pet. App. 1a-19a) *Sedima, S.P.R.L.* v. *Imrex Co. Inc.*, 741 F.2d 482 (2d Cir. 1984); *Bankers Trust Co.* v. *Rhoades*, 741 F.2d 511 (2d Cir. 1984).

Taken together, the decisions in *Sedima*, *Bankers Trust*, and in this case "amount to an en banc ruling by the Second Circuit,"[3] that a civil RICO plaintiff must allege something more by way of "distinct racketeering enterprise injury" beyond that caused by the predicate acts of "racketeering" defined in 18 U.S.C. § 1961.

On October 19, 1984, the Court of Appeals for the Seventh Circuit decided *Haroco, Inc.* v. *American National Bank and Trust Company of Chicago*, No. 83-2529, which, unlike the decisions cited by petitioners (Pet. 11)[4], does create a direct conflict with the Second Circuit.

Notwithstanding the conflict, we respectfully urge the Court to deny the petition for certiorari, for the following reasons:

REASONS FOR DENYING THE WRIT

I

CONGRESS ITSELF IS ABOUT TO ADDRESS THE QUESTIONS POSED BY THE PETITION.

Consideration by this Court of any issue relating to civil RICO—whether raised in the instant petition or in the others filed this Term—may soon be rendered unnecessary because comprehensive congressional review of the statute appears imminent. Congress is now fully seized of what petitioners call the "turmoil" (Pet. 12) of civil RICO.

On October 5, 1984, Senator Thurmond, Chairman of the Senate Committee on the Judiciary, announced that hearings on civil RICO will be held promptly upon the convening of the new Congress. He said:

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3 *Haroco, Inc.* v. *American National Bank and Trust Company of Chicago*, No. 83-2529 (7th Cir. Oct. 19, 1984), slip op. at 8.

4 The Eighth Circuit, for example, stated that its decision in *Alexander Grant & Co.* v. *Tiffany Industries, Inc.*, 742 F.2d 408, 413 (8th Cir. 1984), is "consistent" with *Bankers Trust*.

> [T]he civil RICO part of title IX [of the Organized Crime Control Act of 1970] was crafted to enhance the protection of legitimate businesses against the syndicate's infiltration by dealing with organized crime as an economic phenomenon.
>
> Unfortunately, the scope and intent of the RICO provisions have been the subject of widespread uncertainty and discussion in the courts since their enactment.
>
> * * * * *
>
> Mr. President, when we acted on this RICO statute as part of the Organized Crime Control Act of 1970, I think it is fair to observe that we might not have envisioned the full use of the statute by private civil litigants to include a civil RICO count in their ordinary business litigation alleging misstatements and fraud. In an effort to reach all kinds of racketeering activity, the Congress wrote the statute in broad, sweeping terms. To allege a RICO charge is relatively simple in today's complex, interstate commercial environment. The added appeal of a Federal forum, of a treble damage money recovery, and attorney's fees increases incentives to allege a RICO statute violation in the context of an ordinary commercial law or contract cause of action ordinarily brought in State courts.
>
> * * * * *
>
> It is, therefore, imperative that the Congress hold hearings as soon as possible on this issue to determine if the intention of the Congress in enacting RICO is being carried out, and, if not, what legislative changes are necessary to bring that about. It is my intention to hold such hearings as soon as possible next year after the Congress convenes.

130 Cong. Rec. S 13349-50 (1984).

In the past, one commentator has noted, this Court has declined to review even important questions of state in the expectation of congressional or executive action. *See* Note,

Sovereign Immunity in the Supreme Court: Using the Certiorari Process to Avoid Decision Making, 16 Va. J. Int'l L. 903, 922-23 (1976). Equally, the Court has declined to grant certiorari to resolve clear conflicts among the circuits, seemingly because prompt congressional attention to the conflict was likely. *See* Brief for the United States in Opposition in *Jarboe-Lackey Feedlots, Inc.* v. *United States*, 53 U.S.L.W. 3236 (1984); Brief for the National Labor Relations Board in Opposition in *Spencer* v. *National Labor Relations Board*, 104 S. Ct. 1908 (1984).

In this case, at this particular juncture, petitioners' own arguments on the merits—and the reasoning of those courts and commentators that agree with petitioners' proposed reading of civil RICO—counsel that the Court exercise its discretion so as to deny certiorari.

Virtually all courts and commentators agree that civil RICO *should not* apply to routine commercial disputes of the kind involved in this case. Even the panel below agreed with the Seventh Circuit that its reading of civil RICO would mean that Congress had "created a runaway treble damage bonanza for the already excessively litigious," (Pet. App. 18a, quoting *Schacht* v. *Brown*, 711 F.2d 1343, 1361 (7th Cir.), *cert. denied*, 104 S. Ct. 509 (1983)). But petitioners and others contend that, as now written, civil RICO does so apply, and that appeals to limit the reach of the statute should be made to Congress.

Petitioners argue that for the courts to require a distinct "racketeering enterprise injury" is an inappropriate "intrusion into the legislative process," (Pet. i). The panel below said that restrictions on civil RICO "must come from congress, not the judiciary," (Pet. App. 18a). The Seventh Circuit, in declining to find a racketeering injury requirement, was concerned about engaging in "aggressive jurisprudence," even though the court agreed that Congress had not anticipated application of civil RICO to the kind of banking issue before it. *Haroco*, *supra*, slip op. at 29, 30. Considerations of judicial restraint and deference to Congress are the reasons invariably given for

interpretations of civil RICO that are widely acknowledged to be, at the very least, anomalous. *See, e.g.*, Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, 1120-21 (1982).

We disagree, on the merits, that judicial restraint and deference to the legislature support petitioners' interpretation of civil RICO. But, at a time when Congress has stated it is about to act on civil RICO, such considerations argue against granting certiorari in any civil RICO case during this Term.

II

THE COMPLAINT WAS PROPERLY DISMISSED.

The comprehensive majority opinions in *Sedima* and *Bankers Trust* set out the reasons—based on the statutory words, the legislative history, and sound policy—why section 1964(c) requires a civil RICO plaintiff to allege by way of racketeering injury *something* more than injury derived simply from the alleged underlying predicate acts. We need not repeat those reasons here.

Those reasons do, however, have a special force on the facts of this case. For this case undeniably is a routine common law dispute. On petitioners' interpretation of section 1964(c) of RICO, "every bad faith breach of contract or common law fraud where a plaintiff alleges that defendants used the mails would be transformed into a RICO suit." *North Barrington Development, Inc.* v. *Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980). What is more, petitioners urge that civil RICO even overrides the parties' broad arbitration agreement. On petitioners' theory, an everyday UCC contract by any "enterprise" for the sale of goods, even one containing an arbitration clause, could be turned into a federal RICO claim for treble damages and attorneys' fees, merely by alleging two interstate phone calls and defendant's bad faith failure to deliver.

If petitioners' complaint had been permitted to stand, and if they had been held entitled in a federal court to seek treble damages and attorneys' fees, then they would have worked a wholesale federalization of common law, would have frustrated the decades-old federal policy favoring arbitration, would have enlarged most local statutes of limitations to RICO's ten-year period, and would have created an extraordinary incentive for a further explosion of litigation, when alternatives to litigation are continually encouraged by the Chief Justice and many others. In an age when this Court has struggled to limit the intrusion of state-law civil claims upon the federal system, *see, e.g.*, *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 478 (1977), petitioners ask the Court to accept certiorari in order to thrust the doors of the federal courts open to a degree they never have been opened before.

No court or commentator has suggested that Congress, in enacting civil RICO, affirmatively intended any such "absurd results", *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). To the contrary, despite their conflicting conclusions, the circuits agree that *civil* RICO was accompanied by a "clanging silence of . . . legislative history," *Sedima*, *supra*, 741 F.2d at 492; *Haroco*, *supra*, slip op. at 12. And they agree Congress did *not* anticipate that civil RICO would be used in garden-variety state-law disputes such as that involved here. *Sedima*, *id.*; *Haroco*, *supra*, slip op. at 29.

In these circumstances, the teaching of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), compelled dismissal of the complaint. In *Brunswick*, the Court construed the antitrust analog of section 1964(c) of RICO. Section 4 of the Clayton Act, 15 U.S.C. § 15, provides treble damages and attorneys' fees to persons injured "by reason of" anything forbidden by the antitrust laws. This Court held that plaintiff must show "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent," 429 U.S. at 489 (emphasis in original). In so holding, the Court was guided by this principle:

> Of course, Congress is free, if it desires, to mandate damages awards for all dislocations caused by unlawful mergers despite the peculiar consequences of so doing. But because of those consequences, 'we should insist upon a clear expression of a congressional purpose . . .' before attributing such an intent to Congress.

429 U.S. at 488.

We do not contend, as petitioners have argued we do, that the courts should import wholesale into civil RICO an antitrust standing requirement such as "competitive injury." We do contend that a RICO plaintiff must at a minimum plead injury "of the type" that RICO was intended to redress, both under *Brunswick* and under the most traditional principles for determining when private tort liability may be predicated upon a criminal or regulatory statute. For example, in the famous case of *Gorris* v. *Scott*, L. R. 9 Exch. 125 (Court of Exchequer 1874), *reprinted in* H. Schulman & F. James, *Cases and Materials on the Law of Torts* 337 (2d ed. 1952), defendant had violated the regulatory statute at issue, but the court did not permit a tort action based on that violation because "the damage complained of here is something totally apart from the object of the Act of Parliament, and it is in accordance with all the authorities to say that the action is not maintainable." *Id.* at 338. *See generally Prosser and Keeton on the Law of Torts* 225 (5th ed. 1984)

As in *Brunswick* and *Gorris* v. *Scott*, petitioners' injury here is simply not "of the type" the statute was intended to redress. And it is not rendered "of the type" civil RICO was intended to redress merely because RICO applies to fraud, petitioners have alleged fraud, and "fraud is fraud, whether it is committed by a hit man for organized crime or by the president of a Wall Street brokerage firm." (Pet. App. 11a) The quoted statement by the panel below begs the real question. Before RICO, fraud, and certainly the Wall Street variety, was already the subject of elaborate federal and state regulation, carefully circumscribed and judicially construed. The question is, for

what kinds of civil fraud, and under what circumstances, did Congress intend to superimpose new, draconian federal remedies upon those pre-existing. If it be urged—as petitioners here must urge—that those circumstances include virtually all instances of alleged fraud involving two mailings, then the full answer was given in *Sedima, supra*, 741 F.2d at 492:

> If Congress had intended to provide a federal forum for plaintiffs for so many common law wrongs, it would at least have discussed it. If Congress had intended to provide an alternative and more attractive scheme for private parties to remedy violations of the securities laws—involving decades of statutes, regulations, commentaries, and jurisprudence—it would at least have mentioned it.

Where a proposed construction of a statute leads to "peculiar consequences"—as the panel below seemed to acknowledge petitioners' reading of civil RICO would—courts are required to seek "a clear expression of a congressional purpose" to provide a new federal treble damages remedy for injuries of the type alleged by petitioners. *Brunswick*, *supra*, 429 U.S. at 488. Nothing in the legislative history of *civil* RICO provides any indication, much less a "clear expression," that an ordinary (and arbitrable) common law dispute among business partners is to become the province of the federal courts.

The Seventh Circuit's decision in *Haroco*, like the panel decision below, fails correctly to conduct the analysis required by *Brunswick*. The *Haroco* court acknowledges that Congress did not foresee that *civil* RICO would be used in the ordinary commercial context before it, slip op. at 16-17, 28, 29, and that the legislative history is virtually silent on the intended scope of civil RICO, *id.* at 12, 19. The *Haroco* court concludes, however, that "to say that Congress did not anticipate this subject is not to say that Congress would have excluded it if the subject had been brought explicitly to its attention," *id.* at 29.

This would put the burden precisely the wrong way: under *Brunswick*, where the application of a statute in circumstances unforeseen by Congress leads to "peculiar consequences," courts must seek a clear expression of Congress's intent to *include* the circumstances yielding those peculiar consequences.

The court in *Haroco* errs in other respects. The court states that whether or not Congress intended routine commercial disputes to be within the reach of civil RICO, there is no "principled criterion" for distinguishing cases that are within civil RICO from those that are not. *Id.* at 13, 29. The court, not presented with a ready definition of "racketeering injury," felt obliged to read the literal words of the statute so as not to require such injury and thus to embrace conduct that Congress "did not anticipate." The Seventh Circuit's error here was to equate "principled" criteria with a "simple" criterion. It erred in thinking that the perceived absence of an easy definition means that there is no definition.

This Court has taken a far different approach in analogous circumstances. Justice Brandeis recognized in *Board of Trade of the City of Chicago* v. *United States*, 246 U.S. 231, 238 (1918) that the opening words of the Sherman Act ("Every contract . . . in restraint of trade . . . is declared to be illegal") could not be read literally because "[e]very agreement concerning trade, every regulation of trade, restrains." The Court was not deterred by the absence of a single, simple criterion for distinguishing reasonable from unreasonable restraints upon trade. The distinction was defined in the first instance by a series of general considerations set out by Justice Brandeis, and thereafter left to further judicial construction on a case by case basis.

Similarly, it is not necessary, as the Seventh Circuit appeared to say, that "RICO injury" or "racketeering enterprise injury" be immediately distinguishable from other injury in a phrase or a sentence. The definition may appropriately consist of a constellation of relevant factors. Legitimate definitional content may be imported into "racketeering enterprise injury"

from the legislative history and from established general federal policies (such as that favoring arbitration). The Justice Department's RICO guidelines, while formally applicable to criminal prosecutions, set out some of the kinds of considerations that may properly be included in a definition of racketeering injury for civil RICO. Department of Justice RICO Guidelines, *United States Attorneys' Manual*, Tit. 9, Ch. 110 (adopted Jan. 30, 1981), *reprinted in* ABA, Division of Professional Education, *RICO: The Ultimate Weapon in Business and Commercial Litigation*, Vol. I, Tab D-1, Attachment B (1983).

Requiring a civil RICO plaintiff to allege separate "racketeering injury" does not "distur[b] the policy choices Congress has made," *Haroco*, *supra*, slip op. at 29-30. On the *criminal* side of RICO, Congress did deliberately make a policy choice for overinclusion, and thus the courts are "without authority" to circumscribe its broad provisions, *United States* v. *Turkette*, *supra*, 452 U.S. at 587. But on the *civil* side, no policy choice relating to statutory breadth is discernible from the sparse legislative history. *See Sedima*, *supra*, 741 F.2d at 488-89, 492; *Haroco*, *supra*, slip op. at 12, 19, 29. On the civil side, there is no evidence that "Congress deliberately ch[ose] to unleash such a broad statute on the nation," *Haroco*, *supra*, slip op. at 29.

Nor would a requirement of pleading separate "racketeering injury" constitute "aggresive jurisprudence," *Haroco*, *supra*, slip op. at 30. The traditionalist jurisprudence is to interpret statutes so as to make them fit the pattern of the law—and not to assume that Congress silently or unwittingly worked radical changes in the law, such as those necessarily entailed by petitioners' reading of civil RICO. *See Brunswick*, *supra*, 429 U.S. at 488; Traynor, *Statutes Revolving in Common-law Orbits*, 17 Cath. U.L. Rev. 401, 402 (1968) (courts must "synchronize the unguided missiles launched by legislatures with a going system of common law"); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln*

Mills Case, 71 Harv. L. Rev. 1, 8, 30-31 (1957) (where a particular reading of a statute would work a large structural change in the law, there is no legislative accountability unless the legislators explicitly effect that change). Especially is the jurisprudence not aggressive when the interpretation that would avoid major disruptive changes in the law is based on the traditional principle for determining when tort liability follows from a criminal statute. See p. 12, *supra*.

In sum, while there is room for debate about the persons or precise activities that are within the reach of civil RICO, the present complaint surely is outside the scope of the statute, and it properly was dismissed. To hold otherwise would turn civil RICO on its head, transforming a statute that arguably embraces some types of business fraud in order to ensure an effective remedy against the statute's principal target, organized crime, into an act, the principal effect of which is to federalize the common law (while simultaneously supplanting arbitration and encouraging fraud claims with the lure of treble damages and attorneys' fees), but which reaches organized crime only incidentally, if at all.

III

CONTINUATION OF COURT PROCEEDINGS WOULD DEFEAT THE "CORE PURPOSE" OF THE PARTIES' AGREEMENT TO ARBITRATE.

Although neither court below reached respondents' motion to compel arbitration, it is clear, we submit, that the dispute at bar should never have engendered litigation in any court, state or federal. The Partnership Agreement among the parties contains a broad arbitration clause requiring arbitration of this matter before a panel of the New York Stock Exchange.

Moreover, as a member of the New York Stock Exchange, Bruns and its general partners were bound by rules of the Exchange, which also require arbitration of this dispute. The

Constitution of the New York Stock Exchange, Article VIII, ¶ 1, provides:

> Any controversy between parties who are members . . . and any controversy between a non-member and a member . . . arising out of the business of such member . . . or the dissolution of a member firm . . . shall at the instance of any such party, be submitted for arbitration, in accordance with the provisions of the Constitution and the Rules of the Board of Directors.

In *Southland Corp.* v. *Keating*, 104 S. Ct. 852 (1984), this Court determined to exercise its jurisdiction and avoid frustrating the "core purpose" of a contract to arbitrate:

> Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate.
>
> * * * * *
>
> For us to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state court litigation has run its course would defeat the core purpose of a contract to arbitrate.

104 S. Ct. at 856-7.

The same rationale that led this Court to accept jurisdiction and to rule upon the arbitration issue in *Southland* argues for denying certiorari and thereby terminating this litigation. For the very continuation of court proceedings that a grant of certiorari (or even a decision to hold this case) would necessarily entail would impair the rights that respondents sought to secure by entering into an agreement to arbitrate.

Indeed, petitioners' arguments on the merits here would, as a practical matter, undo *Southland*: minor amendments to the complaint in that case (which alleged "fraud, oral misrepresentation . . . breach of fiduciary duty. . . ," 104 S. Ct. at 855) would have, on petitioners' theory, transformed that case into a federal RICO suit.

CONCLUSION

The petition for a writ of certiorari should be denied.

November 13, 1984

Respectfully submitted,

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